

5 Official Opinions of the Compliance Board 7 (2006)

**EXECUTIVE FUNCTION – ACTIONS TO PURSUE
REMEDIES FOR BREACH OF FRANCHISE AGREEMENT,
HELD TO FALL WITHIN THE EXCLUSION –
REASSIGNMENT OF FRANCHISE BY CITY COUNCIL
HELD TO BE QUASI-LEGISLATIVE FUNCTION, HELD TO
FALL OUTSIDE THE EXCLUSION – QUASI-LEGISLATIVE
FUNCTION – REASSIGNMENT OF FRANCHISE BY CITY
COUNCIL, HELD TO BE QUASI-LEGISLATIVE FUNCTION**

March 9, 2006

Mr. Joseph H. Potter

The Open Meetings Compliance Board has considered your complaint alleging a violation of the Open Meetings Act by the Ocean City Council. Specifically, the complaint alleged that the Council violated the Act by holding a closed meeting on an unspecified date, during which the Council made certain decisions about beach equipment vendors. For the reasons stated below, the Compliance Board finds that, with respect to two items of discussion at the meeting, which took place on January 10, 2006, there was no violation. However, concluding that the topic in question involved a contract, the Compliance Board finds that the Act applied to a third item of discussion and was violated.

I

Complaint and Response

The complaint included an article from the January 20, 2006 issue of *The Dispatch/Maryland Coast Dispatch*, a local newspaper. In the article, the reporter wrote that, “during the Mayor and Council meeting on Tuesday evening [January 17], it was reported officials voted unanimously at a recent closed session to allow the flip of an uptown beach parcel along Condo Row, a late payment from one operator and a future debarment hearing.” The complaint questioned whether the meeting at which these decisions were made was closed in violation of the Open Meetings Act.

In a timely response on behalf of the Mayor and City Council of Ocean City, City Solicitor Guy R. Ayres, III confirmed that at a closed session on January 10, 2006, “the City Council ... considered three matters: (1) an assignment of a beach vending franchise; (2) a requested late payment of a beach vending franchise fee; and (3) non-payment of beach vending franchise fee(s). Each of these issues involved the administration of Ocean City’s beach equipment rental franchise law

.... Upon hearing information presented, the City Council took certain actions that were subsequently reported at the next open session ... as set forth in the newspaper article appended to [the complaint].” The response contended that the meeting on these matters was “an executive function” not subject to the Open Meetings Act.

II

Analysis

If the January 10 session involved an executive function, it was permissible for the City Council to close it to the public, because (with certain exceptions not pertinent here) the Act does not apply to an executive function. §10-503(a)(1)(i).¹ To determine whether a meeting concerns an executive function, and therefore is excluded from the Act, we apply a two-part test: First, is the topic of discussion within any other defined function? If so, the discussion is not an executive function. §10-502(d)(2). Second, if the discussion is not within any other defined function, does it involve the administration of existing law as distinct from any part of the process of formulating new law or policy? §10-502(d)(1). *See, e.g., 4 Official Opinions of the Maryland Open Meetings Compliance Board* 168, 174 (2005);² *4 OMCB Opinions* 99, 107 (2004).

Under the first part of the test, we begin by considering whether the January 10 discussion was encompassed by any other defined function. The only possibility is that the Council’s discussion involved “approving, disapproving, or amending a contract,” which is a quasi-legislative function subject to the Act. §10-502(j)(3).

The matters discussed in closed session on January 10 all involved franchises. Ocean City has established a “beach equipment rental franchise system.” §39-23 of the Ocean City Code. Under this system, the public beach is divided into parcels. Ocean City restricts the rental of beach equipment within each parcel to “the operator who holds the franchise for the parcel.” § 39-23(2). Each three-year franchise goes to the highest bidder at a public auction. The ordinance sets forth a detailed regulatory regime for an operator’s manner of doing business, § 39-25, and creates a Mediation Board with additional regulatory and supervisory power, § 39-24. A franchise may be revoked for, among other reasons, an operator’s failure to pay franchise fees. § 39-26(b). Under some circumstances, an operator may be barred indefinitely from holding a franchise. § 39-24(c)(2).

Does a successful bid for a franchise form a “contract” between the operator and Ocean City? A century ago the Maryland Court of Appeals characterized a

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

² For brevity’s sake, we shall hereafter cite our opinion volumes as OMCB Opinions.

municipal franchise to a telephone company as a contract. *Mayor v. Chesapeake & Potomac Tel. Co.*, 92 Md. 692, 696 (1901). More recently, the Court of Special Appeals, although pointing to the difficulty of exactly characterizing franchises, observed that they “implicate the law of contracts.” *Baltimore Steam Co. v. Baltimore Gas & Elec. Co.*, 123 Md. App. 1, 21-22 (1998), *vacated as moot*, 353 Md. 142 (1999). Moreover, a leading treatise describes an accepted franchise as a contract: “The conditions in the franchise are binding, the same as the terms of any other contract, both on the municipality and the [franchise holder].” Beth Buday and Dennis Jensen, 12 *McQuillin Municipal Corporations* § 34.06, at 21 (3d ed. 1995). Consequently, we shall proceed with our Open Meetings Act analysis on the premise that the three matters before the City Council on January 10 involved contracts.

On this assumption, we next consider whether the January 10 meeting involved any part of the process of “approving, disapproving, or amending [the franchise] contract.” It seems evident that the topics about late payment and non-payment of fees involved implementing the franchise law’s remedies for the operator’s breach of contract, not approving or amending the contracts themselves. As to these two items, the Mayor and City Council engaged in an executive function at the January 10 meeting. The Open Meetings Act did not apply to it, and there was no violation.

The first topic, however – reassigning a franchise – amounts either to an amendment of the contract for the particular parcel, to substitute a new operator, or approval of a new contract with the replacement operator. Either way, this is not an executive function, but rather a quasi-legislative function, to which the Act applied. A closed session not justified by any of the Act’s exceptions is a violation.

III

Conclusion

We hold that the Mayor and Council of Ocean City did not violate the Open Meetings Act when they discussed late payment and non-payment of franchise fees at a January 10, 2006 closed session, because the Act did not apply to these discussions. The Act applied and was violated during the Council’s discussion of reassigning a franchise, which was closed without the Council’s invoking any of the Act’s exceptions.

OPEN MEETINGS COMPLIANCE BOARD

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